UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

WENDT CORPORATION

Cases 03-CA-212225
03-CA-220998
and **03-CA-223594**

SHOPMEN'S LOCAL UNION NO. 576

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJ DECISION

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GENERAL COUNSEL'S ANSWERING BRIEF[1]

It is respectfully submitted that the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence, and should be upheld while Respondent's exceptions should be rejected as they are replete with misstatements of both fact and law.

I. Preliminary Statement

Respondent committed numerous violations of Sections 8(a)(1), (3), and (5) of the Act including but not limited to unlawfully laying off employees, threatening them, interrogating them about protected activities, and readily making unilateral changes. The ALJ correctly found that Respondent's conduct violated the Act. Respondent fundamentally misapplies Board law and misconstrues facts to mislead the Board. Counsel for the General Counsel respectfully requests the Board reject Respondent's exceptions in full and uphold the ALJ's findings.

II. The ALJ Correctly Rejected *Raytheon* (Exceptions 1, 10, 14, 15, and 16)

Respondent relies heavily on *Raytheon* throughout its exceptions. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). Unfortunately for Respondent, its reliance on *Raytheon* is misplaced. *Raytheon*'s extension of the past-practice defense to post-expiration unilateral actions that are consistent in kind and degree with changes made under a management-rights clause does not apply to cases, as here, involving a newly-certified union. First-contract bargaining occurs in a very different context than successor-agreement bargaining, and important policy considerations militate against applying the *Raytheon* standard in this context. Rather, applying extant precedent regarding parties that have not yet reached a first contract, Respondent's

[1] Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Ira Sandron (ALJ) dated February 15, 2019, in the above-referenced cases.

pre-election history concerning terms and conditions of employment does not eliminate its obligation to bargain over post-election changes in those terms and conditions of employment.

As a matter of sound labor policy, *Raytheon* does not apply in cases involving newly-certified unions. New collective-bargaining relationships differ in many ways from mature collective-bargaining relationships and therefore require a different analysis regarding an employer's past-practice defense. The Board has long recognized the uniqueness of first-contract bargaining because it forms the foundation for the parties' future labor-management relationship. As the Federal Mediation and Conciliation Service has observed, "[i]nitial contract negotiations are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns." 57 FMCS Ann. Rep. 19 (2004). And, when employees are bargaining for their first collective-bargaining agreement, they are "highly susceptible" to unfair labor practices intended to undermine support for their bargaining representative. *Arlook v. S. Lichtenberg & Co.,* 952 F.2d 367, 373 *(*11th Cir. 1992). *Accord: Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 239 (6th Cir. 2003). Because of these concerns, the Board has long held that an employer's pre-election past practices "do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices. . . ." *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001). *See also Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 842-43 (2004), *enforced mem.*, 455 F. App'x 5 (D.C. Cir. 2012); *Porta-King Building Systems*, 310 NLRB 539, 543 (1993), *enforced*, 14 F.3d 1258 (8th Cir. 1994); *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), *enforced mem.*, 559 F.2d 187 (D.C. Cir. 1977).

In particular, when parties are bargaining for an initial contract, issues that significantly affect unit employees must remain in play in order to encourage parties to work through differences

and reach agreement. Allowing an employer to unilaterally implement changes based on past practices during first-contract negotiations would likely frustrate the parties' ability to reach agreement. First-contract negotiations are often protracted and difficult—parties may continue to negotiate for years before reaching agreement, even when all are continuing to bargain in good faith. *See generally Dish Network Corp.*, 366 NLRB No. 119, slip op. at 2 & n.4 (Jun. 28, 2018) (finding no lawful impasse despite four years of bargaining for an initial agreement); *Beverly Health and Rehabilitation Services*, 325 NLRB 897, 902-03 (1998) (granting six-month extension despite nine months of good-faith bargaining during the certification year), *enforced*, 187 F.3d 769 (8th Cir. 1999). During that time, if changes to employees' terms and conditions of employment are unilaterally implemented as part of a past practice and thereby removed from the table, employers will have less incentive to reach agreement on a contract and unions will lose necessary employee support. *See generally Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402-03 (2001) (recognizing the "special problems" in first-contract bargaining such as inexperience and animosity between parties compared to parties with an established bargaining relationship), *enforced*, 310 F.3d 209 (D.C. Cir. 2002). As the Seventh Circuit has observed, when too many issues are removed from the table, it is "less likely for the parties to find common ground [and] it . . . embolden[s] [the employer] to hold out for a deal so unfavorable to the union as to preclude agreement." *Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000). Parties have an incentive to make trades and concessions and ultimately reach agreement only when issues of significance to one party or the other remain in play. *See id.* at 998-99.

Furthermore, applying the *Raytheon* standard to first-contract bargaining cases would permit unilateral action by the employer over matters the newly-certified union played no role in establishing. In that regard, whether an employer's past practices were implemented pursuant to

an incumbent union's contract or the incumbent union otherwise acquiesced to them, employees would recognize that the incumbent union participated in creating the status quo. A newly-certified union, on the other hand, had no say whatever in establishing any past practices that developed while it was a stranger to the workplace. The ability to freely continue implementing changes as if the union were not even there would significantly undermine the union's newly-won representative status.

Throughout the brief Respondent relies on *Raytheon* like a crutch. Respondent tries to use *Raytheon* to justify it unlawfully laying off employees (Exception 1),[2] failing to provide bargaining unit members raises and reviews (Exception 10), permitting shop supervisors to perform bargaining unit work (Exceptions 14 and 15), and refusing to bargain over individual disciplines (Exception 16). As discussed above, *Raytheon* is inapplicable in this case. Since this is a first contract bargaining situation, Respondent is not be permitted to take unilateral action.

Moreover, the actions Respondent claims as "past practices" are not past practices at all. The shop supervisor position was created by Respondent after the Union was elected. Similarly, there could be no "past practice" bargaining over disciplines as historically there was no union with which it could bargain. There was also no established history of layoffs that would amount to a past practice. Contrastingly, Respondent refused to provide raises and reviews to its unit members in accordance with what its history would dictate. Yet, it still attempts to rely on *Raytheon* to justify this behavior. For the foregoing reasons, the ALJ was correct in his decision not to rely on *Raytheon* to legitimize Respondent's unlawful acts.

[2] References to the ALJ's Decision shall be designated as (ALJD ___:___) showing the page number first followed by the line numbers; to the Respondent's Brief as (R. Br. __) where the blank is the page number; to the transcript as (Tr. __); to the General Counsel's Exhibits as (GC Exh. ___); to the Respondent's Exhibits as (R. Exh.___); and to Respondent's Exceptions as (R. Exception ___) where the blank is the exception number.

III. Respondent's Layoffs violated Section 8(a)(3) and (5) of the Act (Exceptions 1, 2, 3, and 4)[3]

Contrary to its assertions, Respondent failed to meet the "heavy burden" established in *Bottom Line* and *RBE Electronics*, to justify laying off ten unit employees during first contract negotiations. *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995), *Bottom Line Enterprises*, 302 NLRB 373 (1991). Where "parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBE Electronics of S.D., Inc.*, 320 NLRB at 81 (citing *Bottom Line Enterprises*, 302 NLRB at 373); *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 203-05 (2011) (Board reversed ALJ to find that the layoff of nine employees was unlawful because the employer was obligated to bargain to a complete agreement or overall impasse before implementing layoffs when negotiations were underway).

There are "two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and when 'economic exigencies compel prompt action.'" *RBE Electronics*, at 81 (quoting *Bottom Line Enterprises*, 302 NLRB at 374). A party claiming the economic exigency exception carries a "heavy burden" and must establish "extraordinary events that are 'an unforeseen occurrence, having [a] major economic effect [requiring] the company to take immediate action.'" *Id.* at 81; *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-53 (1987)). For this exigency exception to apply, the employer must establish that "time is of the essence and which demand prompt action," that the "exigency was caused by external events, was beyond its control or was not reasonably

[3] The General Counsel is not taking a position on Respondent's 5th exception.

foreseeable." *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962 (2001) (citations omitted). Notably, the Board has held that a large year-to-year decrease in sales revenue does not justify unilateral action, as it is not properly considered "unforeseen." *Toma Metals, Inc.* 342 NLRB 787, 801 (2004) (the employer's "chronic economic condition did not constitute an extraordinary or compelling circumstance"). Furthermore, action can only be taken if "either the union waives its right to bargain or the parties reach impasse on the matter proposed for change." *RBE Electronics of S.D., Inc.*, 320 NLRB at 81-82.

Here, as the ALJ determined, Respondent failed to demonstrate any economic exigency that could justify the layoff. The events here were not "unforeseen." In fact, in its exceptions Respondent justifies its decision to layoff employees by acknowledging that "the layoff was due to the cyclical nature of the Respondent's business and customer needs." (R. Br. 7). The predictable cyclical nature of its business certainly cannot justify an "unforeseen" need for "prompt action." As previously noted, Respondent's business is cyclical and dependent on the existing marketplace. (Tr. 1096). As such, it is common for Respondent to go through production need increases (particularly at the end of a calendar year) and decreases (particularly at the start of a new calendar year) throughout the year. (Tr. 1093-1100, 1200-03). Contrary to Respondent's claims, its witness testified that Respondent was aware there would be a lull in production that would benefit from a layoff as early as Labor Day. (Compare R. Br. 7 with Tr. 1200-03).[4] Therefore, in the fall of 2017

[4] Respondent claims that the ALJ's decision said the September 24, 2017 bargaining session discussed the layoff. (R. Br. 7). The decision never makes that claim. ALJ Sandron does not cite a specific bargaining session. Rather, the point of his statement, with the support of Respondent's own witness' testimony, is that Respondent was first aware of an upcoming lull in production in September 2017, five months before the layoff occurred, and from that knowledge drew the correct conclusion that there could be no exigency. (ALJD 28:25-29).

when Respondent became aware of a pending "slowdown" in production work starting in early 2018, the need for a temporary layoff was "reasonably foreseeable." (Tr. 1199-1203; R. Ex. 16).

In its exceptions Respondent places unnecessary tasks on the General Counsel while failing to meet its own evidentiary burdens. For example, faulting the General Counsel for failing to impeach Respondent's witnesses on the supposed necessity of the layoff where Respondent has admitted that this temporary slowdown was foreseeable. (R. Br. 8). Meanwhile, demonstrating exigency circumstances is Respondent's burden and Respondent failed to produce any appropriate documentation in the hearing to support this defense. (ALJD 28:22-25). Whether or not Respondent provided supposed exculpatory documents to the General Counsel or to the Union is of no moment; Respondent entered no such documents into the record to defend itself and therefore, the ALJ's negative inference was entirely appropriate.

Additionally, the Union never waived its right to bargain nor did the parties reach impasse on the layoff before implementation. For the foregoing reasons, the ALJ was correct in determining that Respondent was not privileged to unilaterally implement a layoff under *Bottom Line* or *RBE Electronics*.

IV. The ALJ's Determinations Regarding Respondent's Wage Increases and Reviews were Correct (Exceptions 6, 7, 9, 10, 11, 12, and 13)

Respondent, despite perpetually inappropriately relying on "past practice" for nearly every other issue decided to unilaterally change its handling of annual wage increases and performance reviews to frustrate employees' union support. Prior to the Union's election, the bargaining unit expected to receive their reviews and wage increases in the fall. (Tr. 188, 905-06, 1642). However, while Respondent's non-unit employees received reviews and wage increases as expected in September/October 2017, represented employees did not receive performance reviews at all during the 2017 calendar year. (Tr. 738, 906, 1258, 1643). This had never happened before in the history

of Respondent's corporation. In or about November 2017, Respondent ignored the Union's timely requests for unit performance reviews and wage increases. (Tr. 36).

Unit members finally received performance reviews in April 2018, but the issue of wage increases had yet to be resolved. (Tr. 1259, Jt. Ex. 2(a) and (b)). At bargaining on May 8, 2018, Respondent proposed a 3.42% wage increase for all unit employees, retroactive to the date of the reviews, April 8, 2018. (Tr. 39, 137-38, 906, 1260, 1453, 1644; GC Ex. 8). This was Respondent's first proposal regarding wage increases; 6 months after the Union initially requested bargaining on this topic. At the parties' next bargaining session Union representative Anthony Rosaci verbally counter-proposed a 4% wage increase for all unit employees retroactive to October 2017. (Tr. 40, 1455, 1644). At bargaining on May 24, Respondent re-proposed its wage offer, writing that "retroactivity is a negotiated term" and that if the Union did not accept the proposal by June 20, it would rescind the "retroactivity portion" of its proposal. (Tr. 40-41, 138-39, 1260, 1455, 1645; GC Ex. 9). The ALJ found that the Union agreed to the amount of the increase while leaving the retroactivity portion open for further negotiation. (ALJD 30:38-39). In response, Respondent's attorney and lead spokesperson and Respondent's attorney, Ginger Schroeder stated at the bargaining table, "fair enough. You can bargain for that." (Tr. 41, 42, 907, 1028-29; ALJD 30:32-34).

A. The ALJ's Credibility Determinations were Appropriate (Exception 6, 7, and 9)

The ALJ made appropriate credibility determinations and based his factual findings on the record evidence. The ALJ's credibility resolutions depend on a myriad of factors, including the context of the witness' testimony, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inference which may be drawn from the record as a whole." *RC Aluminum Industries*, 343 NLRB 939, 939 n. 2 (2004). It is well-established Board law that an ALJ's credibility resolutions are precluded from reversal unless "a clear preponderance

of all the relevant evidence" convinces the Board that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *American, Inc.*, 342 NLRB 768, 768 (2004) (stating that the Board relies on the judge, as the finder of fact, to make determinations regarding the credibility of witnesses whose testimony is in conflict). It is well-settled that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *Jerry Rice Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)); *see also J. Shaw Associates, LLC*, 349 NLRB 939, 939-40 (2007).

Despite the prevailing law on the issue, Respondent concludes (in its exceptions, though it fails to make any argument regarding these exceptions in its brief) that the ALJ could not accept only part of a witness' testimony. (R. Exceptions 6 and 9). Here, the ALJ relied on the testimony of General Counsel's witnesses William Hudson, David Greiner, and Anthony Rosaci to reach his conclusion. (ALJD 30:38-39). The ALJ chose not to rely on testimony from the Employer witnesses as he concluded one lied about his presence at the meeting and the other relevant testimony was stilted and not believable. This type of conclusion is precisely one that the ALJ is permitted and required to make. The ALJ justifiably used this testimony to determine that while the 3.4% wage increase issue was closed the retroactivity portion remained open for bargaining. Respondent's objections (again, only found within its exceptions and not supported by its brief) would require the ALJ to make different credibility determinations regarding what issues were resolved during bargaining. (R. Exception 7). The ALJ's credibility determinations were reasonable, well-supported by the record evidence and should be upheld.

B. Respondent's Argument Regarding Non-Unit Member Increases is Misguided (Exception 11)

Respondent argues in its exceptions that by demanding bargaining under "different terms than those offered to non-bargaining unit members" the Union lost the ability to claim "discrimination." (R. Exception 11). This argument is particularly ironic given the fact that Respondent refused, and continues to refuse, to provide the Union with the information it requested regarding the non-bargaining unit wage increases and reviews. (*See infra* Part V). Following Respondent's exception to its logical conclusion, the Union was supposed to intuit how Respondent handled this matter with the non-bargaining unit members and then request those exact terms. Importantly, Respondent never offered to provide the unit members with what it was giving the non-unit members. In fact, the Union first demanded bargaining in the fall of 2017, when the employees should have received their wage increases and had their annual reviews. Respondent delayed until May to even provide a proposal on the matter. Respondent's half year delay certainly negates any argument it makes blaming the Union. Respondent's argument that the unit employees may have received a different sum had there been no bargaining is also of no moment; the parties agreed on the across the board 3.42% increase and left the retroactivity portion open for bargaining. The only reason Respondent failed to provide timely wage increases and annual reviews is because of the animus it harbors towards the Union. Accordingly, the ALJ's determination in this regard is appropriate.

C. The ALJ's Remedy for this Allegation is Proper (Exceptions 12 and 13)

Respondent also takes issue with the way the ALJ handled the remedy in the wage increase and annual review portion of the decision. The ALJ's make whole remedy is appropriate and does not exceed the remedy permitted by law. The ALJ's correct assessment that the parties bargained for, and agreed upon, an across the board 3.4% wage increase has no bearing on his make whole

remedy with respect to retroactivity. This remedy is not a windfall for the employees; historically the employees would have received their wage increase in the fall of 2017. Requiring Respondent to provide the bargained-for wage increase and requiring the parties to bargain over further retroactivity doesn't create "two remedies" as Respondent argues. Rather, it creates one coherent remedy that recognizes the successful partial bargaining of the issue (the amount of increase) and requires Respondent to continue bargaining to fully address the violation (the remaining retroactivity issue). For the foregoing reasons, the ALJ's determinations, including the remedy, regarding the wage increase and annual review is appropriate.[5]

V. The ALJ Rightly Decided that Respondent should be Required to Furnish Missing Information (Exception 8)

During bargaining on May 24, the Union requested information regarding the dates that non-unit employees received their wage increases. (Tr. 43, 907). The Union requested this information because it had learned that, historically, the unit and non-unit employees received their wage increases at the same time. (Tr. 43). Respondent failed to reply to the Union's request at the bargaining table, so on May 29, the Union followed up with a written request. (Tr. 43; GC Ex. 10). In the written request, the Union asked, "what was the date of wage increases for non-unit and office personnel?" (GC Ex. 10). On June 19, 2018, Schroeder replied to a portion of the Union's information request, but Respondent refused to provide the requested date of wage increases. (Tr. 45; GC Ex. 11). Instead, Respondent summarily informed the Union that "the Union does not represent the salaried workforce." (GC Ex. 11).

[5] If the Board finds the make whole remedy incompatible with continued bargaining over retroactivity, then the employees should be made whole with a fall 2017 retroactivity date. The employees historically received in the fall, and at a minimum, once a calendar year. By using fall 2017 as the appropriate date, the employees will truly be made whole.

Undeterred, the Union sent Respondent a second written information request. (GC Ex. 12). In this June 22, 2018 letter, the Union's attorney explained that the requested information was relevant because it could impact the retroactivity of unit employee bonuses. (GC Ex. 12). The Union further reminded Respondent that it was still seeking greater retroactivity for the wage increases provided to the unit members. (GC Ex. 12). The Union concluded its written request by asking Respondent to "identify the dates non-bargaining unit employees received wage increases during the period of October 1, 2016 to the present." (GC Ex. 12). Two weeks later Respondent replied, again refusing to provide the requested information. (GC Ex. 13).

On July 11, 2018, the Union responded, again asserting that the information was relevant, that there was no agreed upon date for retroactivity so the information request remained ripe, and that the Union was still seeking the requested information. (GC Ex. 14). To date, there have been no further communications regarding this request and the Union still has not received the relevant information. (Tr. 50).

Contrary to Respondent's assertions, the above information should be provided to the Union. As discussed previously, the ALJ found that the retroactivity portion of the wage increases remains open for bargaining. (ALJD 33:33-40). As such, the requested information remains relevant. Respondent's argument in this regard is based on the improper assessment that the Union accepted the company's wage proposal in its entirety. (R. Br. 27). As the ALJ found, and the evidence shows, the Union never accepted Respondent's retroactivity proposal. (ALJD 33:33-40).

Moreover, Respondent claims that the requested information is only relevant to the issue of the employee evaluations. (R. Br. 27). Respondent's argument in this regard is baseless. As demonstrated by the record evidence, the Union specifically and repeatedly identified that information as relevant to the ongoing retroactivity bargaining. (GC Ex. 12, 14). Simply because

a piece of information could have more than one use does not mean that it is not relevant to its stated purpose. Respondent also claims that the ALJ found that the raises for the bargaining unit and non-bargaining unit members were based on different criteria. (R. Br. 27). However, the portion of the ALJD Respondent cites makes no such assertion. (R. Br. 27). Respondent goes on to claim that the Union recognized the lack of linkage between the unit and non-unit employees by the retroactivity date it proposed. (R. Br. 27). Thus, the missing information is relevant for the Union in making a proposal regarding retroactivity of the wage increases. As such, the Board should uphold the ALJ's decision regarding Respondent's failure to respond to the Union's information request.

VI. The ALJ's *Weingarten* Analysis was Correct (Exception 17)

Respondent's *Weingarten* argument ignores the record evidence and well-established Board law. The Board succinctly summarized its position in *Consolidated Edison Co. of New York, Inc.*, in noting that "*Weingarten* entitles an employee to union representation on request at an investigatory interview which the *employee reasonably believes* might result in his being disciplined." *Consolidated Edison Co. of New York, Inc.*, 323 NLRB 910, 910 (1997) (emphasis in original). On October 25, during work, Voigt asked Fricano to come to his office and discuss an incident regarding Fricano potentially operating the paint booth with a forklift inside. (Tr. 426, 434-35). Fricano immediately requested union representation. (Tr. 426-27, 436). Voigt responded "no, we're just going to go ask you a few questions about what happened."[6] (Tr. 428, 431, 436). Fricano and Voigt then went to Voigt's office. (Tr. 429). Fricano had every reason to believe that the interview would be investigatory since Respondent told him as much. Upholding the ALJ's

[6] There is no dispute that Fricano requested union representation or that Voigt denied that request. Indeed, Respondent's Answer admits it and Respondent presented no testimony to the contrary. (GC Ex. 1[aa]).

ruling by no means requires employers to "ambush" employees publicly to issue disciplines. (R. Br. 36). Rather, the ALJ's ruling discourages Respondents from making a habit of lying to employees about disciplinary interviews.

Importantly, Respondent's exceptions about the ALJ's *Weingarten* holding fails to acknowledge that Respondent told Fricano that he would be terminated the next time he was disciplined and asked him to sign his discipline. (Tr. 429, 438-39; GC Ex. 19). In the portion of the document entitled "Details," Respondent wrote the following:

> On 10/23/17, John Fricano pulled a forklift into the paint booth and closed both overhead doors so he could proceed to paint the materials on the forklift. Rick Howe, Director of Operations, immediately stopped John due to the potential safety hazard of using flammable paint with the presence of anything that could cause a spark, which could result in igniting materials in the paint booth. If John proceeded to paint the materials on the forklift with both overhead doors shut as he intended, and if Rick hadn't stopped him, this may have resulted in severe injury to himself and others up to and including employee casualties. (GC Ex. 19).

The document also contains two boxes for employees to check, one stating "I agree with the above statements" and the other stating "I disagree with the above statements." (GC Ex. 19). Respondent required Fricano to check one of these boxes. Respondent's demand forced Fricano to make an admission concerning his alleged misconduct. By forcing Respondent to sign the document it transformed what could have been a purely disciplinary meeting into an investigatory meeting. In *Baton Rouge*, the Board found that "attempt[ing] to have the employee admit his alleged wrongdoing or to sign a statement to that effect" elevates an employer's "conduct beyond merely informing the employee of a previously made disciplinary decision" to that of an investigatory interview entitling an employee to his *Weingarten* rights. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). In *Texaco, Inc.*, 251 NLRB 633, 636-37 (1980), the Board held that an employer strayed beyond the "ministerial" administration of discipline by securing an

admission from the employee that he engaged in the conduct for which he was disciplined.[7] *See also Bentley University*, 361 NLRB 1038, 1038 fn. 4 (2014) (citing *Price Pfister, a Division of Norris Industries*, 256 NLRB 87, 89 (1981) (a meeting to mete out predetermined discipline was transformed into an investigatory interview when the employer's broad opening comment--"I understand you had some trouble in the department this morning"--elicited an admission of wrongdoing)). Accordingly, either Respondent telling Fricano that he was going to be asked questions regarding an incident or the subsequent demand that Fricano either agree with or deny Respondent's proposed version of events was enough to trigger Fricano's *Weingarten* rights. Accordingly, the ALJ's determination should be upheld.

VII. Respondent Repeatedly Misstates the Facts to Reach its Conclusions (Exceptions 18, 19, 20, and 24)

Throughout its exceptions Respondent ignores relevant facts and misconstrues events to alter the reality of the circumstances surrounding its unlawful acts. Specifically, when addressing Dennis Bush's discipline Respondent asserts Bush made statements that he did not make. Similarly, when appealing the ALJ's factually-supported decision regarding the unilateral change to the overtime policy requiring shipping/receiving employees to work mandatory overtime, Respondent pretends it always had a mandatory overtime policy which is belied by the record evidence. When viewed as presented in the record, the facts make clear that both Dennis Bush's discipline and the unilateral mandating of overtime in shipping/receiving violate the Act and the ALJ's decision in this regard was appropriate.

[7] Although the employee in *Texaco* was accompanied by a union representative, the employer demanded the representative remain silent throughout the meeting. The Board held that this instruction had stymied the employee's *Weingarten* rights, as the representative was prevented from acting as a representative. *Id.*

A. The ALJ Properly found that Respondent Mishandled Dennis Bush's Discipline (Exceptions 18, 19, and 20)

Respondent rests its appeal on the fact that Bush "**us[ed]** the homophobic term FAG." (emphasis added, R. Br. 42-43). However, this expressly contradicts Bush's testimony and the ALJ's decision. Bush's testimony is critical here, since "Respondent did not provide the testimony of either Voigt or Kraebel, or any witness to what occurred; the testimony of either Semsel or Williams of HR; or any documentation showing an investigation." (ALJD 21:19-21). As ALJ Sandron's decision states, "[Bush] did not use the word 'fag' or any other derogatory term." (ALJD 22:14-15). The fact that Bush never used the term is critical; every attempt Respondent makes at comparing past disciplines to Bush's discipline are incomparable. (R. Br. 44). In each instance those employees used a racist or derogatory term as a weapon against another employee. (ALJD 22:8-15). Similarly, the law Respondent cites to support its argument are all centered around the idea that the employee used a derogatory term, which again, Bush did not. (R. Br. 43). Here, Bush was simply fulfilling a friend and coworker's request for a storage box for scrap wood. (Tr. 804-05, 857, 880). He did not print "FAG" on the side of the box, nor did he point the term out to the recipient or anyone else. (Tr. 968, 998, 1672). Respondent's sudden concern about creating a hostile work environment is ironic considering it has no policy for destroying or blacking out the apparently inherently offensive boxes and they continue to be used around the facility. (Tr. 1000, 1047). In fact, the FAG box in question is still being used by the recipient with the letters facing outward remaining free to offend any passersby. (Tr. 805-06).

Respondent also takes umbrage with the ALJ's finding that Respondent's failure to investigate this incident before issuing discipline evinces animus.[8] (R. Br. 43). Board law is clear:

[8] The ALJD also cites Voigt's repeated unlawful statements as evidence of animus here. (ALJD 21:5-6). As discussed above, Respondent's objections to using Voigt's statements as evidence of animus are unfounded and improper. (*See infra* Part VIII).

failing to conduct a full and fair investigation (*Hewlett Packard Co.*, 341 NLRB 492, 492 fn. 1 (2004); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973)), interview employees (s*ee Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004); *Tubular Corp. of America*, 337 NLRB 99, 99 (2001)), or follow its own stated disciplinary procedures and policies (*see Fayette Cotton Mill*, 245 NLRB 428 (1979); *Keller Mfg. Co.*, 237 NLRB 712, 713-14 (1978)) all support a finding of animus. Respondent justification of its actions by asserting that "Mr. Bush never disputed the conduct" so "there was nothing to investigate" is particularly humorous given the fact that they never interviewed him. (*compare* R. Br. 43 *with* ALJD 21:12-13). Respondent's objections to the ALJ's determinations regarding Bush are without merit, accordingly the ALJ's decision should stand.

B. Respondent Distorts Facts Regarding Mandatory Overtime (Exception 24)

Again, Respondent misrepresents the facts to justify its exception. Respondent claims that "the witnesses all agreed that, during other busy periods, management would indicate that overtime would be required" and that on at least one occasion shipping/receiving employees "had been told that overtime was 'mandatory.' (R. Br. 45). Respondent distorts the facts to continue to try and apply *Raytheon* where it is inapplicable. *See supra* Part II. These statements are inaccurate. Even if *Raytheon* applied, which it does not, Respondent has no history of mandating overtime.

Indeed, at a September 29 bargaining session Respondent's agent and attorney Ginger Schroder admitted as much when told the Union the company did not currently have mandatory overtime, "but that the Company wanted such a provision in a collective-bargaining agreement." (ALJD 45:28-30). As the ALJ found, "company policy is that overtime is strictly voluntary." (ALJD 45:38). Moreover, on the only prior occasion in the record where shipping/receiving employees were told overtime was mandatory the directive was rescinded before any "mandatory" overtime was worked. (ALJD 46:10-12; Tr. 650-51, 657). Shipping/receiving employees do not work daily overtime; indeed, the reality is far from it. Shipping/receiving employees use their own

discretion to determine what overtime, if any, they will work and have consistently been allowed to reject overtime without penalty (Tr. 646-48, 961, 1041, 1045-46, 1447, 1485). The ability to reject overtime epitomizes its voluntary nature. In its exceptions Respondent admits that it mandated overtime to its shipping/receiving employees in November 2017. (R. Br. 46). This admission, the inapplicability of *Raytheon*, and the record evidence demonstrating that this overtime mandate was a unilateral change proves that Respondent violated the Act and the ALJ's decision in this regard should be upheld.

VIII. Respondent Misunderstands how Animus is Attributable to an Employer (Exceptions 21, 22, 23, 25, and 27)

Throughout its exceptions Respondent attempts to lead the Board away from the undeniable conclusion that its anti-union animus motivated its unlawful actions. To do this, Respondent tries to distance itself from the actions of its plant manager, Daniel Voigt, by asserting that his unrebutted unlawful statements should not be attributable to Respondent as animus. Unfortunately for Respondent, there is no legal basis for its claim. As ALJ Sandron correctly concluded, "the Board has long recognized that 'Section 2(13) of the statute makes it clear that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not.' *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987); *see also Storer Communications*, 294 NLRB 1056, 1077 (1989); *Jays Foods, Inc.*, 228 NLRB 423 (1977), enfd. on this point 573 F.2d 438, 445 (7th Cir. 1978). (ALJD 9:28-33). Respondent admits that Voigt is a statutory supervisor and made no attempts during the hearing or its subsequent briefings to dispute this fact. (R. Brief 22 fn. 16).

Respondent again, instead of relying on existing Board law, demands the Board change the law to suit its needs and require the General Counsel demonstrate direct evidence between Respondent's clear anti-union animus and the unlawful actions it took because of that animus. As

a result, "[i]t is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corp. of America*, 337 NLRB 99 (2001). [Citations omitted.], s*ee Olathe Health Care Center, Inc.*, 314 NLRB 54 (1994); *Abbey's Transportation Service*s, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). "The Board has noted that such things as suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees as support for an inference of animus and discriminatory motivation." *Gloria Oil and Gas Co.*, 337 NLRB No. 177 slip op. at 7 (2002), *Metro Networks Inc.*, 336 NLRB 63, 65 (2001), *Medic One, Inc.*, 331 NLRB 464, 475 (2000), *Adco Electric Incorporated*, 307 NLRB 1113, 1129 (1992). Requiring the General Counsel to fulfill its obligation to demonstrate animus with only direct evidence would allow Respondents to escape punishment by simply being slightly more devious in the way in which it demonstrates its animus.

The General Counsel was under no obligation to demonstrate specific animus against Hudson. (Exceptions 21, 22, and 23). The record shows, and the ALJ correctly found, that Voigt repeatedly made Respondent's anti-union intentions clear. Respondent failed to put in any evidence regarding plant manager Voigt's repeated unlawful statements. His statements alone were enough to fulfill the General Counsel's obligations demonstrating animus. As explained above, Respondent's arguments that the General Counsel needed animus specifically directed at Hudson are baseless. Voigt made it clear that Respondent would be taking adverse action against its union supporters, of which Hudson was particularly vocal. Respondent's decision to take one

of its admittedly most-skilled welders and require him to work a menial job for weeks and refuse him overtime, while others were permitted to work overtime, was certainly an "adverse action."

Similarly, the ALJ's findings about Rulov's evaluation were proper. (Exception 25). In this exception Respondent wants to view Rulov's written evaluation in a vacuum. During the oral performance review Respondent explicitly revealed its intentions. Respondent, through plant manager Voigt, pointed at Rulov's pro-union "fair contract now" button and told him that he should work more overtime, concentrate on his job, and ignore any outside activities. (Tr. 404, 407). This comment was repeated in his evaluation. (Tr. 405, 418; GC Ex. 43). There is no question that the oral comment and the written comment were one and the same; union activity and work activity are incompatible. Respondent should be held responsible for these unlawful statements, both oral and written.

Finally, Respondent's argument regarding the ALJ's notice completely misunderstands the law surrounding animus and agency. "We" is the proper pronoun to use in the notice. (Exception 27). As explained repeatedly above, supervisor Voigt's unlawful statements are attributable to Respondent. There is no lawful or legitimate argument to the contrary and there is certainly no First Amendment violation. When Respondent's supervisor violated the Act, those actions became Respondent's actions. Respondent should be required to acknowledge that it, because Voigt is a supervisor and agent of Respondent, violated the Act. Respondent should not be permitted to distance itself from its unlawful conduct. For the forgoing reasons, the Board should uphold the ALJ's conclusions regarding Respondent's anti-union animus.

IX. Respondent's Attempt to Reconceive *Jencks* is Inappropriate (Exceptions 26 and 28)

Respondent concludes its exceptions by asking the Board to again overturn well-established law, this time regarding *Jencks*. *Jencks v. US*, 353 U.S. 657 (1957). At its core, Respondent wants free reign of all the material in General Counsel's possession at the start of a

hearing. In this case, Respondent requested the material before the hearing had even begun; Respondent wanted every affidavit taken for every witness the General Counsel might possibly call. (Tr. 20-22). Naturally, Respondent's request was entirely inappropriate; almost as inappropriate as using its exceptions, rather than a special appeal,[9] to request to Board overturn the ALJ's ruling in this regard. The proper time for a request of *Jencks* material is at the close of the direct examination. *U.S. v. Martinez,* 151 F.3d 384, 390-91 (5th Cir. 1998). It is premature to demand production earlier. *See also H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993) (production cannot be required by subpoena on theory that employee witness waived confidentiality by giving copy to the union) and *Edwards Trucking Co.*, 129 NLRB 385, 386 fn. 1 (1960). For the foregoing reasons the Board should decline to revisit the well-established practice regarding *Jencks* material.

X. Conclusion

For all the reasons set forth above, General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge in their entirety.

Dated at Buffalo, New York, this 10th day of May, 2019.

Respectfully submitted,

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[9] Respondent never took a special appeal on the ALJ's ruling.